

E.P.No.15/2014**27.03.2017**

Shri Ravindra Singh Chhabra, learned counsel for the petitioner.

Shri Vivek Patwa, learned counsel for respondent no.1.

Shri Sudhanshu Vyas, learned counsel for the State.

This order shall govern disposal of I.A.No.1455/2017 and I.A.No.1340/2017.

I.A.No.1455/2017 is filed by the petitioner. According to the facts stated in the application this Court in proceedings dated 22.2.2017 recorded in the order sheet as under:-

“Counsel for the petitioner submits that if the certificate is issued by Shri Dinesh Singh Chouhan it will fulfill the purpose and he is ready to face the consequence.”

It is further stated in the application that on 11.01.2017, Shri Dinesh Singh Chouhan, the then SHO Police Station, Mhow was present before the Court and he was directed to issue a certificate under Section 65-B of the Indian Evidence Act, 1972 (hereinafter referred to as the Act). When direction was issued, Shri Chouhan was present in the Court and no protest was made by him. Shri Chouhan instead of issuing a certificate, filed an application I.A.No.658/2017 seeking necessary direction of this Court and this application was disposed of by order dated 14.02.2017 directing him to file the details of shop owner, who had prepared the copy of the original CD of regular size.

Subsequently an affidavit was filed by Constable Shri Anil Ahirwar, who was posted at the relevant time at Police Station Mhow, district Indore who took the original CD to a computer shop run by Mohammad Ansar. It is further submitted in the affidavit that Mohammad Ansar had expired before some time.

Counsel for the petitioner stated that such CD was prepared under the direction of Constable Shri Anil Ahirwar. He is competent to issue the certificate under Section 65-B of the Act. Counsel for the petitioner thereafter made a concession that if the certificate is issued by the Constable Shri Anil Ahirwar, the purpose would be fulfilled and that he is ready to face the consequence. However, instead of Constable Shri Anil Ahirwar name of Shri Dinesh Singh Chouhan was mentioned in the order sheet.

I have heard the counsel for the petitioner and also perused the relevant portion of the order sheet. The order sheet was dictated in open Court in the presence of the counsel himself. No protest was made at the relevant date and, therefore, after the note sheet was signed, no case is made out for incorporating any modification/correction in the order sheet.

In view of the aforesaid, this application has no force and is dismissed accordingly.

I.A.No.1340/2017 is filed by Shri Dinesh Singh Chouhan, the then SHO, Police Station Mhow, district Indore. Presently, he is posted as SHO, Police Station

Kotwali, district Dhar.

In the application it is stated that the CD which was submitted to the Commissioner during the enquiry which the Commissioner was conducting under the orders of this Court was got prepared by Constable Shri Anil Ahirwar from the shop of Mohammad Ansar who has expired meanwhile. The shop is located at Mhow in the name of Galaxy Computers. When this Court ordered to identify the shop from where the CD was prepared, Constable Shri Anil Ahirwar went to the shop and then he came to know the factum of death of Mohammad Ansar. Constable Shri Anil Ahirwar also submitted an affidavit on 21.02.2017 in this respect stating the same facts on oath.

Now the question arises as to who will be the proper person in such a situation to issue a certificate under Section 65-B of the Act. Section 65-B provides for admissibility of electronic records. Sub section (2) of Section 65-B of the Act and in respect of the Certificate Sub section (4) of Section 65-B of the Act provides as under:-

“(2) The conditions referred to in the Sub-section (1) in respect to the computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3).....

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is

appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.”

In the case of **Anvar P.V. Vs. P.K.Basheer (2014) 10 SCC 473**, the Hon'ble Apex Court as laid down that if a certificate issued in accordance with the provisions of Section 65-B of the Act, no electronic record/electronic output can be admitted in evidence. In para 24 of the judgment Hon'ble Apex Court laid down the following exceptions:-

“24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as

primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65B of the Evidence Act.”

The law laid down in the case of Anvar P.V.(Supra) is also reiterated by Hon'ble Apex Court in the case of **Harpal Singh @ Chhota Vs. State of Punjab (2017) 1 SCC 734.**

This Court while disposing of I.A.No.6036/2016 vide order dated 09.08.2016 issued the following directions:-

“Thus, the application [I.A. No.6036/2016] is allowed. Therefore, Commissioner, Madhya Pradesh State Election Commission, Bhopal himself or by any officer not below the rank of District Election Officer but not the District Election Officer, Indore be directed to make the inquiry and submit its report within a month from the receipt of copy of this order along with the annexures on following points.

(i) Why after direction of the Appellate Authority under Right to Information Act, 2005, CD has not been supplied to the petitioner ?

(ii) Why the CD has not been produced in the Election Petition ?

(iii) If the CD is destroyed, so what action has been taken against the erring officers ?

[8] Office is directed to immediately send the photo copy of this order; application [I.A. No.6036/2016] along with the annexures and affidavit filed by Mr. Santosh Taigore and his deposition by a registered letter to the Commissioner, Madhya Pradesh State Election

Commission, Election Building, 58 Arera Hills, Bhopal”.

In compliance of this order the Commissioner submitted his report by letter dated 27.09.2016 which was taken note of by the Court on 21.10.2016. With this report a CD was also attached. It is stated that the CD contains the videography made by Police Station Mhow, during Vidhan Sabha Elections held in 2013. The CD was prepared by an official camera which used CD of small size. 22 such CDs are available in the record of concerning Police Station alongwith the Camera. When in the enquiry, the CD was sought by the Commissioner as stated above, Constable Shri Anil Ahirwar got the CD prepared and submitted it before the Commissioner which was forwarded by the Commissioner to this Court.

I have gone through the report. The CD is stated to be the original CD. However, subsequently as stated above, it was found that the CD was a copy of the original CD prepared by Constable Shri Anil Ahirwar in a computer shop run by one Mohammad Ansar, who is reportedly expired.

In such a situation if we go through the provisions of Section 65-B of the Act, as quoted above, Sub section 2(a) provides that the computer by which copy was produced was used regularly to store or process information for the purpose of any activities. In this case, a video camera was used to prepare videography of various events during elections and that

was under the control of Police Station Mhow where the Constable Shri Anil Ahirwar was also posted. Similarly, Sub section 2(a)(c) and (d) of Section 65-B of the Act can also be certified by the said Constable. Sub section (4) provides that the certificate should be signed by a responsible officer. The Constable Anil Ahirwar was posted and he was the person having knowledge of all the circumstances under which the copy was prepared and, therefore, he appears to be the proper person to issue the certificate in this regard. This view is also to some extent supported by judgment of Delhi High Court in the case of **Kundan Singh Vs. The State 2015 Lawsuit (Delhi) 5843** dated 24.11.2015 in which it was held that the Doctrine of hearsay in its application to proof of electronic evidence has been limited a great deal. When it is not possible to produce certificate from person in charge of the computer system at that time, the person assuming charge later on can issue certificate. Such evidence cannot be eschewed merely on the ground of hearsay.

Accordingly, after going through the law laid down by the Hon'ble Apex Court in the case of Anvar P.V.(Supra) and Harpal Singh (Supra), as also the provisions of Section 65-B of the Act, it is directed that the said Constable Shri Anil Ahirwar should issue a certificate in accordance with the provisions of Section 65-B of the Act pertaining to the CD submitted to the Commissioner during enquiry.

On payment of necessary process fee by the petitioner, issue notice to the Constable Shri Anil Ahirwar to appear before the Court alongwith the certificate under Section 65-B of the Act for recording of his statement for the purpose of proving the certificate before this Court on 10.04.2017.

List on **10.04.2017**.

**(ALOK VERMA)
JUDGE**

RJ/